

APPEAL NO. 010284

This appeal after remand arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was originally held on October 2, 2000. The Appeals Panel, in Texas Workers' Compensation Commission Appeal No. 002503, decided December 4, 2000, remanded the case to the hearing officer for reconstruction of the record. A hearing on remand was held on January 3, 2001. The respondent (claimant) did not appear at the hearing but did present a letter dated January 8, 2001, stating that he understood a transcript of the original hearing was provided by the appellant (carrier) and that he did not wish to offer any additional evidence or appear at the hearing on remand. The hearing officer, in a decision and order on remand of another hearing officer determined that claimant is entitled to supplemental income benefits (SIBs) for the fourth quarter. Claimant did not respond to the appeal.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant earned less than 80% of his average weekly wage (AWW) as a direct result of the compensable injury. Carrier asserts that claimant failed to prove what his AWW is, so he failed to prove that he was underemployed. Claimant testified, and the hearing officer found, that claimant made between \$1500.00 and \$2000.00 per week before his compensable injury. At the hearing, carrier did not argue that claimant's AWW was anything other than what claimant had testified. Carrier also did not argue at the hearing that claimant did not meet his burden to prove direct result. Instead, carrier asserted only that claimant had not met the good faith SIBs requirements. For the first time on appeal, carrier offered an affidavit regarding the amount of claimant's AWW. However, there is nothing to show that this evidence could not have been obtained earlier. We will not consider this evidence for the first time on appeal. Claimant testified that he earned \$16.00 per hour during part of the filing period in question, before he had to quit because he could not do the work. Claimant said he was employed earning \$16.00 per hour as a porter during the filing period until April 28, 2000. The qualifying period ran from February 9, 2000, to May 10, 2000.

We have reviewed the complained-of determination and conclude that the issue involved a fact question for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

Judy L. S. Barnes
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Michael B. McShane
Appeals Judge